certificate bears the common seal of the company (BHSB) and the signatures of its then directors and the stamping mark dated 29 October 1985 appear therein. On these facts, presumption of regularity may be applied to it. For the aforesaid reasons, it is my view that the said certificates need not be formally proved further. And, as ownership of the said shares is pleaded in para 2 of the statement of claim, on the authority of *Day* v *William Hill*,[1] it is open to the court to look at the said certificate without the necessity of formal proof. Therefore, by virtue of the provision of s 100 of the Companies Act 1965, the said certificate is accepted as prima facie evidence of the title of the plaintiffs to the shares.

That being the case, it is necessary for the said defendants to have an interest in BHSB in order to maintain their defences relating to their challenge on the validity of the alleged share transfer (*Bhikku Daeng* v *Maung Shwe Tyn*[2] and *Chik bte Abdullah* v *Itam bte Saad*[3]). As the said defendants are not the shareholders of BHSB, they are strangers so far as BHSB and the plaintiffs are concerned. Hence, they lack the legal capacity to attack the validity of the share certificate. Further, the shares in BHSB until the alleged transfer was the property of HFP. Assuming that the said defendants' stand as shareholders of HFP, they have no right, legal or equitable, to the property of HFP (*Macaura* v *Northern Assurance Co*[4] and *Yeng Hing Enterprises* v *Liow Su Fah*[5]). Hence, they cannot complain against the alleged transfer of the shares which was then the property of HFP. As HFP owned the said shares (in BHSB), HFP is the proper person to complain (Walter Woon, *Company Law*, pp 225-226 and *Prudential Assurance* v *Newman Industries (No 2)*[6]).

In the final analysis, I conclude that the said defendants are incompetent to challenge the validity of the alleged transfer as raised in their defence, ie they do not have the locus standi to maintain their defence in its present form. The said defendants as directors of BHSB cannot dispute the plaintiffs' right as shareholder. Only the shareholders of BHSB, ie HFP can do so, in which case HFP should have been brought in as a party. Therefore, the preliminary objection is hereby sustained.

Order accordingly.

Solicitors: *Lawrence Chai & Peter Soong; Jayasuriya Kah & Co.*

Reported by *Shaun Chan*

Re Ling Yew Huat & Anor

HIGH COURT (SIBU) — CRIMINAL REVISION NO 5 OF 1989
CHONG SIEW FAI J
14 NOVEMBER 1989

Criminal Procedure — Bail — Showing cause why bail bond should not be forfeited — Principles to be applied

Two sureties, Ling Yew Huat and Lau Yioh Hie, stood bail for an accused person, Ling Yew Mee, who was released on bail in the sum of $8,000 in two sureties. The accused failed to appear in court and the sureties were ordered by the sessions court to pay a penalty of $12,000 ($8,000 by Ling and $4,000 by Lau).

Held, quashing the order of the sessions court:

(1) When an accused fails to appear, before ordering payment of a penalty, the court should consider if sufficient cause has been shown and if not, whether the circumstances are such that the whole sum should be enforced. The power to impose a penalty should be exercised judiciously.

(2) The order of payment of $12,000 clearly exceeded the amount fixed in the bail bond of $8,000 in two sureties and was erroneous.

(3) The burden of satisfying the court of relief against full penalty or that the full sum should not be imposed lies with the surety.

(4) Lau had reminded the accused to go to court and upon his failure to attend, had informed him again to go to court. Sufficient cause had therefore been shown against imposition of any penalty.

(5) Ling had only attended court once and had not shown that he made any attempts to ensure the accused's attendance. He was therefore ordered to pay a penalty of $4,000.

Cases referred to
1 *Valliamai* v *PP* [1962] MLJ 280 (folld)
2 *Ramlee & Anor* v *PP* [1969] 1 MLJ 42 (folld)

Legislation referred to
Criminal Procedure Code (FMS Cap 6) s 404(v)

Abdul Rahman bin Sebeli (Deputy Public Prosecutor) for the respondent.
Wong Sin Nang for the applicants.

Cur Adv Vult

Chong Siew Fai J: In Criminal Case No SSC/1/87, the accused was released 'on bail in the sum of $8,000 in two sureties ...'. The two sureties, Ling Yew Huat and Lau Yioh Hie, entered into a bail bond in which they bound themselves jointly and severally to forfeit the sum of $8,000 in the event of the accused failing to appear in court.

The accused having failed to turn up in court on the adjourned date, 17 April 1989, notices were issued to the sureties to show cause why the sum should not be paid. In the result, the learned sessions court judge ordered a total

sum of $12,000 to be paid, ie in the case of Ling Yew Huat $8,000 and in the case of Lau Yioh Hie $4,000.

Ordering the payment of $12,000 clearly exceeded the amount fixed in the bail bond and was erroneous. The mistake might well have been caused or contributed to by the fact that separate notices each stating the sum of $8,000 were issued to the two sureties and that they appeared and were dealt with in court on different dates.

Where an accused fails to appear in court, before ordering payment of full penalty, the court should consider the matter in two stages.

(1) Has sufficient cause been shown against forfeiture or imposition of penalty?
(2) If not, are the circumstances such that the whole sum of the penalty ought to be enforced?

(*Valliamai* v *PP*[1] and *Ramlee & Anor* v *PP*.[2])

Under s 404(v) of the Criminal Procedure Code (FMS Cap 6), the court has the discretion to remit any portion of the penalty and enforce payment of part thereof. The discretion, of course, must be exercised judiciously according to established principles. The burden of satisfying the court of relief against full penalty or that full sum should not be imposed lies with the surety. It is for him to lay before the court the evidence of want of culpability. The effort or steps taken by a surety to secure or ensure the accused's appearance in court should be considered with the two stages stated above in mind.

The record of proceedings in the criminal case in question shows that in the case of Lau Yioh Hie, his evidence, which was unchallenged, was that a few days before 17 April 1989 he kept reminding the accused to go to court and the accused promised him he (the accused) would do so, that Lau knew of the accused's failure to attend court a few days after 17 April 1989 and that thereupon he informed the accused to go to court. Though, unlike *Ramlee & Anor* v *PP*,[2] Lau did not take steps to ensure the attendance of the accused on 17 April 1989 as he was not in Sibu, the accused had promised him that he would attend. In my opinion, sufficient cause has been shown against imposition of penalty: *Ramlee & Anor* v *PP*.[2] Lau had shown reasonable attempt to cause the accused to attend court. Lau also said that the accused went to the court registry on the third day but was informed that the case had been fixed for another date. I quash the order of the sessions court judge forfeiting the bond and order that the sum $4,000 be refunded to Lau.

In the case of Ling Yew Huat, the explanation is far less satisfactory. There is no evidence as to what he had done to ensure or secure the attendance of the accused in court on 17 April 1989. He said he could not come back to Sibu in time as he had to be in Sarikei because of someone's death. But there is nothing showing what he had done prior to that; nor what he would have done had he been in Sibu on 17 April. However, some sense of responsibility had been demonstrated by this surety in that he attended court ahead of the adjourned date of 17 April 1989, ie on 4 April 1989. Also, this is not a case of the accused absconding or failing to turn up in court at all. Having regard to all the circumstances, I consider it fair if Ling Yew Huat is ordered to pay a penalty of $4,000.

I understand that both sureties had paid in full the respective sums imposed upon them by the sessions court. In the circumstances, I order that the amount $4,000 imposed and paid by Lau Yioh Hie be returned to him and that out of the amount $8,000 imposed and paid by Ling Yew Huat, a sum of $4,000 be refunded to him.

Order accordingly.

Solicitors: *Wong & Co.*

Reported by *Mathavan Devadas*